

Pursuant to Ind.Appellate Rule 65(D),  
this Memorandum Decision shall not be  
regarded as precedent or cited before  
any court except for the purpose of  
establishing the defense of res judicata,  
collateral estoppel, or the law of the case.

APPELLANT PRO SE:

**EARNEST MOORE**  
Michigan City, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**MATTHEW D. FISHER**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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EARNEST MOORE,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A05-0510-PC-615
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Defendant.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Robert R. Altice, Judge  
Cause No. 49G02-9704-CF-48888

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**August 30, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

Earnest Moore was convicted of Rape, as a Class A felony, Criminal Deviate Conduct, as a Class A felony, and Criminal Confinement, as a Class B felony, following a jury trial. On direct appeal, this court affirmed his convictions. See Moore v. State, Cause No. 49A02-9811-CR-908 (Ind. Ct. App. July 8, 1999) (“Moore I”). Moore subsequently petitioned for post-conviction relief, which the court denied. He now appeals, challenging the post-conviction court’s judgment, and he raises a single issue for our review, namely, whether he was denied the effective assistance of trial counsel.

The State asserts that Moore did not timely file his notice of appeal. As such, the State contends that we are without jurisdiction to hear this appeal. We agree with the State.

We dismiss.

## **DISCUSSION AND DECISION**

The post-conviction court issued its Findings of Fact and Conclusions of Law Denying Post-Conviction Relief on September 6, 2005. Moore’s Notice of Appeal is file-stamped October 11, 2005, which is untimely. See Ind. Post-Conviction Rule 7; Ind. Appellate Rule 9. We issued an Order to Show Cause instructing Moore to demonstrate that his notice of appeal was timely filed. In other words, we gave Moore an opportunity to prove that he mailed his notice of appeal by October 6, 2005.

In response to that Order, Moore has submitted his Verified Motion to Show Cause Why His Appeal Should Not Be Dismissed, wherein he states that he mailed his notice of appeal on October 3, 2005. Attached to that Motion is a copy of a “Request for

Remittance” indicating that Moore purchased \$1.06 in postage from the prison mail room on October 4, 2005. But that document does not indicate what the postage was used for, nor does the document show, in any fashion, that anything was actually mailed. Further, that document is inconsistent with Moore’s claim that he mailed his notice of appeal on October 3, 2005.

Our supreme court has held:

When a person incarcerated in Indiana places a pleading addressed to a clerk of court in the hands of prison officials for mailing, that act is the functional equivalent of mailing by certified mail. See Ind. Trial Rule 5(E)(3). If the incarcerated person is able to demonstrate that the placement of the pleading in the hands of prison officials was done timely, a rebuttable presumption is created that the pleading is timely filed, whether applying Ind. Trial Rule 5 or Ind. Appellate Rule 23.

Johnson v. State, No. 02S05-0311-PC-582 (Order Granting Petition to Transfer, November 25, 2003). In Johnson, the defendant provided sufficient evidence that his notice of appeal was timely filed by submitting a copy of a “Legal Mail Log” showing the date that he sent a document to Allen County via the prison mail system and a notarized “Notice of Compliance” from a prison law librarian confirming that the notice of appeal was timely mailed.

Here, however, the Request for Remittance that Moore has submitted is inadequate on its face to prove compliance with Indiana Trial Rule 5 or Indiana Appellate Rule 23. Moore has not demonstrated that his notice of appeal was timely filed, and we must dismiss his appeal. See Greer v. State, 685 N.E.2d 700, 703 (Ind. 1997).

Dismissed.

SHARPNACK, J., and ROBB, J., concur.